entry at page 217 of this book by the plaintiff in his own handwriting comes after the credit entry of $150 in respect of shop rent. There is no evidence that the plaintiff queried that entry at any time. I would therefore repeat that the defendants have proved allegations (d) and (f) beyond any reasonable doubt.

Having found as a fact that the plaintiff directed the shopkeeper to credit his personal account with shop rents, that he took advantage of such credit and that he failed to reimburse the estate with the amount of the shop rents, I must hold that the defendants were justified in summarily dismissing him. Misconduct inconsistent with the due and faithful discharge by the servant of the duties for which he was engaged is good cause for his dismissal, but there is no fixed rule of law defining the degree of misconduct which will justify dismissal. If he is guilty of fraud or dishonesty in connection with the business of his employer, he may be dismissed (see *Halsbury*, 3rd edition, volume 25, page 485, paragraph 934).

Because of his summary dismissal the plaintiff is not entitled to any damages for wrongful dismissal. He made a general claim for damages, but by reason of the decision in *Hayward & Anor.* v. *Pullinger & Partners, Ltd.*[2] the statement of claim was amended so as to claim three months' loss of wages as special damages by way of damages for wrongful dismissal. This claim, however, as I have said, must fail.

The plaintiff is also not entitled to his salary for the period 1st August to 27th August, 1964 on the ground that his salary was paid monthly and it was not due and payable on the date of his dismissal. In this connection I would refer to the following passage in *Smith's* Law of Master and Servant, 7th edition, at page 132:—

"When a servant, whose wages are due periodically, refuses to perform his part of the contract, and serve his master in the manner contracted for or so conducts himself that the master is justified in discharging him without notice, he is not entitled to be paid any wages for that portion of time during wh.ch he has served since the last periodical payment of wages. That is to say, if a servant whose wages are only due yearly abscond from his master, or is rightfully discharged before the expiration of the year, he could recover nothing for services rendered previous to such departure or discharge. And the same principle would apply to the case of a quarterly, monthly or weekly hiring. In any of such cases, if the servant fails to perform his part of the contract, or be rightfully discharged at any intervening period between the days when his wages are due, he can recover nothing for the broken period of service. This is upon the principle that the contract was an entire contract, and the performance of the service for the whole time agreed upon was in the nature of a condition precedent to the right to recover any wages."

The plaintiff, however, is entitled to accrued leave pay for six weeks at $560 per month for the period 1st July, 1962 to 30th June, 1964 together with a provident fund of 15% thereon as claimed. He is also entitled to his transport expenses from Labis to Kuala Lumpur and back as claimed. There will thus be judgment for the plaintiff for $1,059.75 with costs on the sessions court scale.

Order accordingly.

Solicitors: *P. G. Lim; Shearn, Delamore & Co.*

LING NAM RUBBER WORKS v. LEONG BEE & CO.

[F.C. (Ong Hock Thye F.J., Raja Azlan Shah & Pawan Ahmad JJ.) January 26, 1968]

[K.L. — Federal Court Civil Appeal No. X. 76 of 1966]

Negligence — Fire in a factory spreading to the neighbouring premises causing extensive damage — Damage unforeseeable — Criterion of liability.

Nuisance — Negligence — Damage unforeseeable in nuisance is necessarily unforeseeable in negligence.

Master and servant — When master vicariously liable.

About 5 a.m. on February 2, 1964 a fire broke out in a factory manufacturing rubber slippers and spread to the neighbouring premises causing extensive damage. The workmen in the factory had departed and all machinery had stopped at the end of the previous working day. A night watchman installed in the factory was asleep until awakened by warning shouts of "Fire" from outside. The cause of the fire was never established.

In an action claiming damages on the grounds of nuisance, negligence and the rule in *Rylands* v. *Fletcher*,[1] Azmi C.J. (Malaya) dismissed the claim in nuisance but held the defendants liable in negligence. The rule in *Rylands* v. *Fletcher* was not considered. The defendants appealed against the verdict in negligence and the plaintiffs cross-appealed in respect of nuisance and the quantum of damages.

Held: foreseeability being a common factor in nuisance and negligence, damage unforeseeable in nuisance is necessarily unforeseeable in negligence. On the facts, neither the watchman nor his employers could have reasonably foreseen the outbreak of fire in a deserted idle factory, even as a remote possibility.

Semble (per Ong Hock Thye F.J.): "Where the fault of master or servant, individually, does not amount to negligence in law on the part of either, the joint and cumulative fault of both' cannot render the master vicariously liable.

Appeal allowed, and cross-appeal dismissed, with costs.

Cases referred to:—

(1) *Rylands* v. *Fletcher* (1886) L.R. 1 Ex. 265.

(2) *The Wagon Mound* (*No. 2*) [1966] 2 All E.R. 710.

(3) *Goldman* v. *Hargrave* [1966] 2 All E.R. 989, 992.

(4) *The Wagon Mound* (*No. 1*) [1961] 1 All E.R. 404, 415.

(5) *Bolton* v. *Stone* [1951] A.C. 850.

FEDERAL COURT.

Peter Mooney for the appellant.

C. S. Wu for the respondent.

Cur. Adv. Vult.

Ong Hock Thye F.J.: This is an appeal from a judgment of Azmi C.J. (Malaya) given on October 1, 1966, in the High Court at Johore Bharu by which he awarded to the respondents the sum of $87,135.82 in respect of damage caused by fire to their properties.

The respondents were dealers in motor spare parts occupying a shophouse, No. 85A Jalan Scudai in Tampoi, Johore. The appellants owned the adjacent premises Nos. 73, 75, 77 and 79 used by them as a factory for the manufacture of rubber slippers. These premises, including the respondents' shophouse, were situate within the industrial area of Tampoi. At about 5 a.m. on February 2, 1964, long after the appellants' workmen had departed at the end of the previous day's work, a fire broke out in the factory which spread rapidly on to the respondents' premises, causing considerable damage to both properties. The cause of the fire was never established. It was in evidence, however, that the appellants had installed a night-watchman in the factory who failed to remain awake or sufficiently alert, so that, upon discovering the fire, he was unable to take any effective steps to prevent it from spreading to the respondents' premises.

The respondents sued these appellants for damages, on the alternative grounds of nuisance and negligence, in addition to strict liability under *Rylands* v. *Fletcher*.[1] The learned Chief Justice in his judgment did not advert at all to *Rylands* v. *Fletcher*, and held that "the plaintiffs have failed to prove on the ground of nuisance", but he decided in their favour on negligence. The appellants now appeal against the verdict of negligence while the respondents cross-appeal in respect of nuisance as well as the quantum of damages. Since *Rylands* v. *Fletcher* has been abandoned as a ground of the cross-appeal, nothing more need be said on the point here.

The nice distinctions between the torts of nuisance and negligence are often not easily perceived; indeed the two have not infrequently been somewhat confused in the past: see on this point the Privy Council judgments of Lord Reid in *The Wagon Mound (No. 2)*[2] and of Lord Wilberforce in *Goldman* v. *Hargrave*,[3] in which latter case his Lordship made the following observation:—

> "As this Board has recently explained in *The Wagon Mound (No. 2)*, *Overseas Tankship (U.K.) Ltd.* v. *The Miller Steamship Co., Pty., Ltd.*,[2] the tort of nuisance, uncertain in its boundary, may comprise a wide variety of situations, in some of which negligence plays no part, in others of which it is decisive."

There is, however, one common feature of liability, both in negligence and nuisance, for which one need only refer conveniently to *The Wagon Mound (No. 1)*[4] and *The Wagon Mound (No. 2)*. The test is the same for each tort, namely foreseeability of the damage. Thus, it was laid down in *The Wagon Mound (No. 1)* at p. 415 that in negligence "the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen". Then, in *The Wagon Mound (No. 2)*, at p. 717, it was affirmed that "it is not sufficient that the injury suffered . . . . was the direct result of the nuisance if that injury was in the relevant sense unforeseeable."

Turning to the facts of this case, it will be immediately observed that the learned Chief Justice's finding of fact was that there was no nuisance. He said this:—

> "In my view, however, on the facts the plaintiffs have failed to prove on the question of nuisance. I found as a fact that the building, perhaps not the best kind for the purpose, had been approved by the local authorities. who had placed certain conditions which appear to them to provide sufficient safety measures. I would therefore dismiss the claim on this account."

This finding of fact, of course, implies he was satisfied not only that the conditions laid down as to safety measures were sufficient to remove all foreseeable hazards, but also that those conditions had been complied with and observed by the appellants, notwithstanding arguments by the respondents to the contrary.

It is therefore not a little surprising that, in the next breath, as it were, the learned Chief Justice took a contrary view of the appellants' liability in negligence, which, of course, implies foreseeability of the event resulting in damage. If the damage was unforeseeable with regard to nuisance, how could the same damage have been foreseeable in negligence? Foreseeability, after all, is the common factor in both. It is desirable, therefore, that I reproduce in full the learned Chief Justice's judgment which immediately follows the passage just quoted:—

> "On the question on negligence. I would also dismiss for the reason above negligence based on grounds (i), (i)(a) and (ii). I will therefore now consider the question on negligence on particulars (iii), (iv) and (v). On this question I think the following evidence would be relevant. The defendants employed D.W.3 as a watchman who in my view was incompetent. I accept his evidence that he was there the whole night because on this ground the plaintiffs did not try to dispute but I feel considerable doubt that he was really awake during the part of the night and early next morning. I accept the evidence of both the experts called by the plaintiffs that the fire must have originated some hours before it was discovered which would have meant that the fire started in a small way until the rubber materials became effected (*sic*). If the jaga had really been awake I feel sure that he would have become aware of the burning by the powerful smell the burning rubber must have produced. An ordinary watchman would have noticed this powerful smell. Again, fire extinguishers were provided but I accept the evidence of the fire officers none of them had been used. The jaga also

failed to telephone the police or the fire engine when he easily could have done so on the office telephone (*sic*) where he said he was lying (*sic*) all night. If he had been a younger man or a more suitable person and less excitable I am sure that he could have telephoned either the police or the fire brigade long before the fire had developed and destroyed the defendants' premises. I am also sure that the jaga had no knowledge of how to deal with a case of fire. I would therefore say that the plaintiffs succeed under particulars (iii), (iv) and (v)."

The particulars of negligence which were referred to by numbers above are set out in full in the judgment of the learned Chief Justice. Suffice it to say here that the particulars (iii), (iv) and (v) all belong to the category of omissions, either by the appellants or their servant, to take proper precautions against, and proper step upon, an outbreak of fire. They all postulate, of course, that fire in the factory was foreseeable by the appellants; not, be it emphasised, an outbreak while the workers were there and the machinery in motion, but while the factory was deserted and its machinery idle.

The manifest self-contradiction, therefore, compels me to ask: "Is there anything in the judgment of the learned Chief Justice showing he was at all aware that foreseeability of the damage is the essential test of liability in negligence?" I observe that he cited no authority whatsoever in the whole of his judgment, nor any statement of principle, established by precedents, upon which he based his decision. As the judgment shows, all he did was merely to refer to what he thought was relevant evidence, namely, the employment of an incompetent watchman, the probability that he was asleep, his failure either to use the fire extinguishers available, or to telephone the fire brigade or police and, finally, his lack of training to cope with such an emergency. In the result it will be necessary to analyse the true nature of these findings in order to ascertain whether the conclusion he came to on negligence was true or false.

The first point to consider is whether the learned Chief Justice drew any distinction in his mind between "fault" on the part of the appellants and that on the part of their servant? ("Fault" would seem to be the *mot juste* descriptive of conduct). From the passage quoted the fault appears to have been regarded as an amalgam of both, although on balance the particulars of negligence (iv) and (v) rather point to the principle of vicarious liability. I am afraid I am utterly ignorant of any authority for the novel proposition that, where the fault of master or servant, individually, does not amount to negligence in law on the part of either, the joint and cumulative fault of both will nevertheless render the master vicariously liable. With respect, it seems to me that we are witnessing an original development of the common law in the new Malaysia, if his Lordship's judgment is any authority. What other *ratio decidendi*, if indeed there is any, can be deduced from the bare recital of facts said to be relevant to his conclusion?

As to these facts, it will be observed, on the one hand, that the appellants only could have been held to blame for employing an incompetent servant and for not having trained or advised him how to act in such an emergency; on the other hand, the watchman was considered blameworthy mainly for sleeping on his job and to a lesser extent for incompetency. Taking each case separately, the first question that comes to mind, as regards the appellants, is whether it was ever within their contemplation, even as a remote possibility, that any fire could break out at night in an idle factory which was deserted by all except the watchman. In my judgment no reasonable person would say that the chance of its happening was any more to be anticipated than that Miss Stone would be struck by the cricket ball which flew a distance of 100 yards from within the grounds of the Cheetham Cricket Club: see *Bolton* v. *Stone*.[5]

As to the watchman, surely the important point that should have been made, but was not, was whether, assuming that he was sleeping on his job, he was aroused while the fire was still reasonably within his power to subdue. Unless this was established — indeed the evidence was all the other way — his fault lay solely in his having fallen asleep. Then, again, as regards his failure to use the fire extinguishers, there is not a scrap of evidence that they were within his reach or that his access to them was not barred by the flames. His evidence, which was in no way shaken, was that the first warning he received was "a shout outside the factory to the effect that fire had broken out." Since the fire was of such proportions that it was already clearly visible from outside when his attention was called to it, was any inference open that the extinguishers were still available for his use, without any evidence to that effect? Thus it all boils down to this: Was he negligent simply because he had allowed himself to drop off to sleep, considering that the risk of fire was not more foreseeable by him than by his employers?

As appropriate to the circumstances of this case, would with respect adopt what Lord Wilberforce said last year in *Goldman* v. *Hargrave*:—[3]

> "In such situations the standard ought to be to require of the occupier what is reasonable to expect of him in his individual circumstances. . . . he should not be liable unless it is clearly proved that he could, and reasonably in his individual circumstances should, have done more."

In my judgment, the fact that the fire at that hour was wholly unforeseeable by the appel-

lants or their servant must be conclusive in their favour in negativing negligence on the part of either of them.

It remains only to add a word on the cross-appeal on nuisance. Foreseeability being also an element in the tort of nuisance, the cross-appeal equally fails.

I would allow this appeal, dismiss the cross-appeal and set aside the judgment of the learned Chief Justice, with costs here and in the court below.

Raja Azlan Shah and **Pawan Ahmad JJ.** concurred.

Appeal allowed.

Solicitors: *Skrine & Co.; Donaldson & Burkinshaw.*

FOONG YEW SACK v. FOONG YEW SENG

[O.C.J. (Chang Min Tat J.) January 12, 1968]
[Ipoh — Originating Summons No. 564 of 1967]

Landlord and Tenant — Subletting prior to effective date of Control of Rent Act — Election to treat subtenancy as joint-tenancy — Whether notice could be given more than three months after Act came into force — Control of Rent Act, 1966, s. 19(2) — Construction of.

Interpretation — Control of Rent Act, 1966, s. 19(2) — Rule to be followed where meaning is plain.

This was an application under O. 54A r. 1A, R.S.C. 1957, for the construction of section 19(2) of the Control of Rent Act, 1966. The question for the decision was whether a landlord of controlled premises could by notice given more than three months after the coming into force of the Act on January 1, 1967 but within one month from his receipt from the tenant of the statement in writing of the particulars of subletting, elect to treat a subtenancy existing before January 1, 1967 as a joint-tenancy.

Held: on a proper construction of section 19(2) of the Control of Rent Act a landlord had three months from January 1, 1967, in the case of a sub-letting existing before that date to make his choice to treat such sub-letting as a joint-tenancy.

Cases referred to:—

(1) *Curtis* v. *Stovin* (1889), 22 Q.B.D. 512.

(2) *Ditcher* v. *Denison* (1857), 11 Moore P.C. 324 at p. 337; 14 E.R. 718 at p. 723.

(3) *Cowper-Esesx* v. *The Local Board of Acton* (1889), 14 App. Cas. 153 at p. 169.

ORIGINATING SUMMONS.

S. A. Lingam for the applicant.

S. N. Leow for the respondent.

Cur. Adv. Vult.

Chang Min Tat J.: This is an application made by way of originating summons under Order 54A rule 1A of the Rules of the Supreme Court for construction of section 19(2) of the Control of Rent Act, 1966 whether a landlord of controlled premises could, by notice made more than three months after the coming into force of the said Act on 1st January, 1967, but within the period of one month from his receipt from the tenant of the statement in writing of the particulars of the sub-letting, elect to treat the subtenancies existing before the said 1st January, 1967 (hereinafter called the effective date) as joint-tenancies, and for various declarations of his rights under the Act in connection with such sub-letting by way of ancillary reliefs.

Section 19(2) reads as follows:—

"Upon receipt of the statement referred to in paragraph (a) of subsection (1) the landlord may within one month of the receipt of such statement or in the case of subtenancy existing on the date on which this Act comes into force, within three months of such date, by a notification served on the tenant treat such subtenancy as joint-tenancy. . . ."

Under section 19(1), the tenant is required, where he has sub-let the premises, within 14 days after each sub-letting or in the case of a sub-letting existing before the effective date within three months from that date to supply to the landlord with a statement in writing of the particulars of the sub-letting. I pause here to note that this statutory duty on the part of the tenant is to be performed without any demand from the landlord. Failure to do so on the part of the tenant is an offence under section 19(6) of the Act and would appear to render him liable to an order for the return of the premises to the landlord under section 16(1)(b) of the Act.

No difficulty arises in the case of subtenancies granted after the effective date, and nothing hinges on the failure on the part of the tenant to supply within the time stipulated in the Act the relevant information regarding the sub-letting, as the landlord has one month from the receipt by him of the statement to elect to treat the sub-letting as a joint-tenancy.

But in the case of sub-letting granted before the effective date, difficulty can arise, or perhaps it is more accurate to say, can appear to arise where the tenant fails to comply with his statutory duty within the period of three months from the effective date. In such circumstances, the landlord could *prima facie* reasonably complain that he had to await the receipt of the relevant statement in writing of the sub-tenancy or subtenancies from the tenant before he could be in a position to exercise his election and from thence, argue that he must have, and it is within the meaning of the Act to give him, the period of one month after the receipt of the statement and he was not limited to the period of three months from the effective date.

Even if one's sympathy for the landlord, who is so badly served by his tenant, is not misplaced, it is nevertheless the plain duty of the court to construe the pertinent section in its plain and obvious meaning and to give effect to the intention of the Legislature as expressed in the language of the Act.